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November 16, 1992

1073-101

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 87-268
Advanced Television Systems and their Impact
Upon the Existing Television Broadcast Service

Dear Ms. Searcy:

Submitted herewith on behalf of Community Broadcasters Association, are the **COMMENTS** on the FCC's Second Further Notice of Proposed Rule Making. Enclosed are an original and nine copies, a copy for each of the Commissioners.

If there are any questions concerning this matter, please communicate directly with this office.

Respectfully submitted,

COMMUNITY BROADCASTERS ASSOCIATION

James E. Dunstan

Its Attorney

JED/cp
Enclosure

Before The

Federal Communications Commission

Washington, D.C. 20554

In The Matter Of	)	
	)	
Advanced Television Systems	)	MM Docket No. 87-268
and Their Impact Upon the	)	
Existing Television Broadcast	)	
Service	)	

TO: The Commission

THE COMMUNITY BROADCASTERS ASSOCATION'S COMMENTS ON THE FCC's SECOND FURTHER NOTICE OF PROPOSED RULE MAKING

The Community Broadcasters Association ("CBA"), through its attorneys, hereby files its comments in response to the FCC's Second Further Notice of Proposed Rule Making ("Second FNPRM"), FCC 92-332, released August 14, 1992. In response, CBA submits:

I. BACKGROUND

CBA is a trade organization which represents the interests of the low power television ("LPTV") industry. CBA's membership includes approximately 110 LPTV stations. CBA's interest in this proceeding is seeing that the television industry's transition to advanced television ("ATV") be accomplished with the least disruption to the delivery of diverse voices to the American viewing audience. The programming that community broadcasters deliver is part of that mix of diverse voices, and should be taken into account when considering ATV allocations, and not merely ignored when convenient. CBA submits that the public interest is not served if LPTV stations are needlessly destroyed, or required to endure the cost of changing channels if such change can be avoided.

The FCC's recent approach to LPTV regulation has been schizophrenic at best. In its Second Report and Order/Further Notice of Proposed Rule Making, 7 FCC Rcd. 3340, 3350 (1992), the Commission concluded that "There is no doubt . . . that LPTV and translator services provide important benefits, serving minority and specialized audience, providing locally-based services to communities, and generally furthering diversity." The Commission reached a similar conclusion when it relied upon LPTVs to help make up the six-signal effective competition standard adopted in 1991. Effective Competition Standard, 6 FCC Rcd. 4545, 4550-51 (1992). Congress similarly has recognized the important part LPTV operations play in delivering diverse programming by granting must-carry status to some LPTVs in the 1992 Cable Act, Section 4, (adding new 47 U.S.C. § 534). The above evidences clear statutory and regulatory indications that the low power television service is succeeding in serving the exact need the FCC assigned to it when the service was initiated. LPTV Report & Order, 51 RR 2d 476 (1982).

Yet against this backdrop, the FCC is embarking on a regulatory course which, as demonstrated below, could needlessly destroy the LPTV industry, merely because the FCC has reached the a priori conclusion that no allocation scheme is possible which can accommodate any LPTV operations, and therefore, LPTV has no role in this process. The Commission has done virtually nothing to attempt to integrate this proven valuable service into the next generation of television.[1] The FCC's approach to LPTV in this

[1] The "bones" thrown to the LPTV industry are nearly bare. All the Commission has agreed to date is to continue to allow LPTV stations to file displacement applications or interference-curing technical amendments without triggering an opportunity for competing applications. 7 FCC Rcd. at 3352. The promised new rule making on relaxing NTSC interference protection rules is nowhere on the horizon. The Commission's recent decision to allow LPTV stations to continue operating in NTSC mode indefinitely will be of benefit only if the entire ATV service winds up as a regulatory failure similar to AM stereo. Further, allowing continued NTSC operation manifestly does not mute the question of whether LPTV stations should be granted primary status when the "dust settles" in ATV implementation and all television stations, both full power and low power, have expended the large sums of money to convert to ATV operation.

proceeding is antithetical to its history of attempting to preserve and enhance local voices.[2]

II. THE FCC's APPROACH TREATS LPTVs NOT AS SECONDARY, BUT AS LAST

Since the inception of the LPTV service, the Commission has made very clear that LPTV stations must vacate channels when they interfere with operating television stations. LPTV Report and Order, 51 RR 2d at 486. The LPTV industry has grown up knowing of this restriction, and has been able to plan accordingly. CBA continues to maintain, however, that the low power television service was never "secondary" to advanced television, and should not be so today. It is unfair for a government to change the fundamental status of an industry in the way the FCC contemplates doing to the low power television service.

Moreover, now for the first time, the FCC has shifted the status of LPTV stations from being secondary to operating stations to being secondary to theoretical stations. And that is where the Commission simply has missed the boat. This is due, in part, to the fact that the FCC has stated that it will make ATV allocations for all permittees, applicants and even long-empty commercial allocations. Second FNPRM, ¶ 37.[3]

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[2] Compare the FCC's treatment of the LPTV industry in this proceeding to how the FCC provided for AM daytimers in Docket 80-90. In Docket 80-90, the FCC pointed to its "strong policy to improve the ability of [its] licensees to obtain expanded service," and thereby afforded them comparative credit in future comparative hearings. Implementation of BC Docket 80-90, Second Report and Order, 101 FCC 2d 638, 643-46 (1985), *recon. denied*, 59 RR 2d 1221 (1986), *further recon. denied*, 2 FCC Rcd. 481 (1987), *aff'd. sub. nom.*, National Black Media Coalition v. FCC, 822 F.2d 277 (2d Cir. 1988). Not only are the pioneering efforts of community broadcasters to bring much-needed local service to less urban areas not being rewarded, the Commission is not even trying to minimize the loss of such programming to viewers. At the very least, the Commission should adopt a similar regulatory approach as it did in Docket 80-90 as to AM daytimers, and allow LPTV stations to apply for the first set of ATV allocations after the full power stations on a preferred basis.

[3] CBA cannot understand the FCC's protection of applicants for full service stations on the one hand and its refusal to protect any operating LPTV stations on the other. The Commission has recently stated: "We avoid depriving parties who invested in television broadcasting before they had clear notice of our intent to phase out NTSC broadcasting at a future ate and to cease permitting broadcasting in NTSC." Third Report and Order, ¶ 8,

An example bears this out. Assume that in a given market, there are four operating full power NTSC television stations, one construction permit holder, one applicant, one empty allocation under § 73.606, and one operating LPTV station. Under the Commission's present allocation methodology, it would provide a pool of seven ATV channels to the market. Assume further that one of the seven allocations was for the frequency on which the LPTV station was operating, or co-channel to such operation. If any of the four operating stations chooses to operate on the LPTV's frequency, the LPTV station will be displaced, even though there are three remaining vacant ATV channels available for ATV conversion. Similarly, even assuming a best case scenario that both the permittee and the applicant will be able to find sufficient financing to build two new television stations each (one NTSC and one ATV), the LPTV operator would be knocked off the air even though there remains a non-interfering ATV channel.[4]

In effect, the LPTV station has been displaced by a hypothetical television station.[5] CBA submits that the public interest manifestly is disserved by removing a diverse voice in favor of an empty allocation, and is in contravention of Section 307(b) of the Communications Act. Such a regulatory

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n. 10. Why should the Commission protect parties who applied for NTSC channels in 1991, nearly four years after the FCC let its intention be known that it was intending on instituting a new television service, and at the same time refuse to even attempt to protect LPTV operators who believed the Commission in 1982 that the LPTV service could be a vital link in the broadcasting industry, and filed applications at early as 1984? What of LPTV's investment? What of all the years spent by many operators to establish themselves in their communities? Apparently, the FCC believes the "investment" of a paper application for a full power station should take precedence over years of operation in the public interest.

[4] CBA casts this argument in the hypothetical in part because of the Commission's admonition that the draft table of allocations is illustrative in nature only, and that comments should be limited to the methodology, and not the actual allocations contained in the draft table. Second FNPRM, ¶ 7.

[5] The degree to which the FCC does not understand what it is doing is evidenced by the FCC's prior response to similar concerns raised by member of the LPTV industry. In its Second Report and Order in this proceeding, the FCC describes the regulatory status of the LPTV service as secondary to "'*any* TV broadcast station' *operating* on the same or adjacent channel." 7 FCC Rcd. at 3351 (first emphasis in original, second emphasis supplied). Yet, as demonstrated herein, the FCC has now reduced LPTV status to secondary to any *allocated* ATV channel.

approach also flies in the face of the prior Commission's promise to ease the impact of ATV transition on viewers. See Third Report and Order, FCC 92-438, released October 16, 1992, ¶ 13.

III. THE FCC HAS FAILED TO DEMONSTRATE WHY, IN PRACTICE, IT CANNOT TAKE OPERATING LPTV STATIONS INTO ACCOUNT WHEN ALLOCATING ATV CHANNELS

In its May 8, 1992, Second Report and Order, 7 FCC Rcd. 3340 (1992), The FCC concluded that it could not even consider protecting existing, operating LPTV stations in allocating channels for ATV.

> Based on Staff and Advisory Committee technical studies, we find that there is insufficient spectrum to permit LPTVs and translators to be included in the class of broadcasters initially eligible for an ATV frequency on either a primary or secondary basis or to factor in LPTV displacement considerations in making ATV assignments, as several parties argue.

7 FCC Rcd. at 3351 (footnote omitted). This global conclusion was based on one study conducted four years ago, and one study from eighteen months ago. Id. at 3351, n. 119.

Yet in describing the draft table of allocations, the FCC now states that eighty percent of all channels can be allocated well beyond the minimum 125 mile ATV-to-ATV spacing distances (themselves seemingly overly conservative, as discussed above). Second FNPRM, ¶ 54. There is absolutely no indication in the Second FNPRM that any computer runs were even attempted which would protect operating LPTVs where possible. If there is indeed this much flexibility in the allocation algorithms used, then why hasn't the Commission at least reconsidered protecting existing LPTV operators where possible? In the one instance where an LPTV operator showed that in the most congested market in the country (New York), allocations could be made

to protect the LPTV and translator operations, the FCC claimed to be able to incorporate a number of those proposals, demonstrating that if the Commission had any interest in protecting operating LPTV stations, it could. Second FNPRM, ¶ 42, n. 49 (responding to comments filed by Island Broadcasting, licensee of three low power television stations in the New York area).

CBA therefore strongly urges the Commission to adopt a fifth objective in its allocation methodology -- the protection of presently operating LPTV stations. CBA understands that this objective would have to give way to the other four articulated objectives where the Commission finds instances where it is impossible to protect a particular LPTV station because of congestion. This approach is far superior to simply "writing off" the entire industry, as has been the Commission's approach to date.

IV. THE ALLOCATION METHODOLOGY PROPOSED IN THE SECOND FNPRM IS PREMATURE

In addition to prematurely concluding that it could protect no LPTV stations, the FCC's allocation methodology itself inherently is flawed as premature. In its Second FNPRM, the FCC attempts to outline an allocation methodology which it claims will best facilitate the introduction of ATV. One of the critical components of the allocation methodology is the separation standards adopted. The FCC concludes that the minimum spacing between co-channel ATV-to-ATV allocations should be 125 miles. Second FNPRM, ¶ 25. The FCC reaches this conclusion even though it admits that it is based on "very little analytical data on expected performance" of the various proposed ATV systems. Id., ¶ 28, n. 36. Further, at paragraph 23, the Commis-

sion notes that the system proponents claim they need only between 100 and 115 miles co-channel separation.[6]

Especially in the heavily congested Northeastern corridor, the minimum separation standards adopted will have a significant impact on the ultimate allocation of ATV channels. If the separation standards are too conservative, as the comments of the system proponents would indicate, the FCC could needlessly be destroying LPTV stations which might be saved if the separation standards were closer together. This is because, by definition, the closer the separation standards, the more channels can be allocated within a region, reducing the chance of displacing a community broadcaster and increasing the probability of finding a new non-interfering channel if that becomes necessary.

CBA therefore strongly urges the Commission not to adopt firm separation standards until it has the empirical data on system performance it admits is totally lacking today. Similarly, CBA urges the Commission to direct the Advisory Committee to fully investigate the real-world propagation characteristics of the tested systems at the earliest possible date so that the FCC can use this data in determining the proper separation standards.

V. LICENSING PROCEDURES MIGHT MITIGATE THE DAMAGE DONE AT THE ALLOCATION STAGE OF THIS PROCEEDING

If the Commission refuses to address LPTV displacement at the allocation stage, it can nevertheless lessen viewer disruption at the subsequent licensing stage. CBA emphasizes that such remedial measures are a poor substitute for properly dealing with LPTV displacement at the allocation

6 The Commission also notes that "ATV signals are expected to be much less susceptible to multipath and flutter than NTSC signals" while failing directly to state the impact on this finding on separation standards. Second FNPRM, ¶ 18.

stage, but nonetheless raises these issues here because they do impact the allocation procedure as it relates to which station ends up with which allotted ATV channel.

A. The Commission Should License All Non-LPTV Allocations First

The first way in which the FCC could minimize the disruption to the viewing habits of viewers during the transition period would be to hold the LPTV Channel until the last of the "existing" broadcasters files a construction permit application. This would minimize the possibility that the LPTV operator would be displaced by an empty allocation. To the extent that an existing broadcaster seeks authorization to operate on the LPTV channel, the FCC should require a showing of why it is in the public interest to displace the operating LPTV station when a non-conflicting ATV allocation exists.[7] If valid technical reasons exist, then a waiver would be granted. Absent this, the waiver should be refused. "Maximum flexibility" should not be equated with the ability to eliminate a competitor from the marketplace.

B. LPTV Stations Should be Included In Any Intra-Market Settlement of Allocations

The Commission has indicated that it will encourage intra-market settlements of allocations. Third Report and Order, ¶ 32. LPTV operators should be made a part of this process. Again, the public interest is not served if such settlements do not take into account the disruption of all

[7] The ATV allocations present a manifestly different situation than do present NTSC allocations, which would allow for this different procedure. With NTSC allocations, requiring a full power newcomer to demonstrate why it should not displace an operating LPTV operator would be futile, since in almost every instance there are no extra allocated NTSC channels to choose from, and requiring an NTSC applicant to petition to add allocations would be time consuming and costly. With ATV allocations, however, as demonstrated above, it is quite possible that there will be extra allocated ATV channels at the outset from which full power stations could choose without cost or delay of the implementation of new service.

television signals to viewers. If LPTV stations are included, and the full power stations desire to silence the LPTV station for non-technical reasons, the LPTV operator would have the right then to refuse to accept the settlement, and make its case to the FCC as to why the pool of ATV channels is sufficient to accommodate the then-operating stations without removing the diverse LPTV voice.

C. The FCC Should Not Insulate Anticompetitive Practices of Full Power Stations

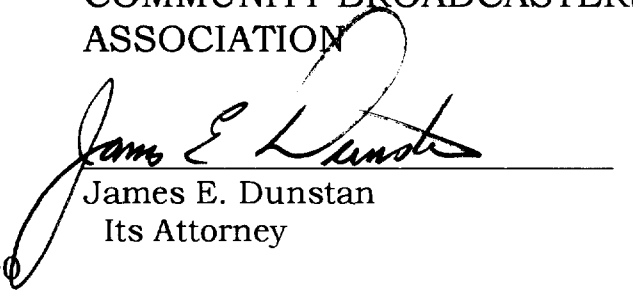
At the very least, if LPTV stations are to be excluded from the allocations process and excluded from intra-market settlement agreements, the FCC should make clear that such settlements do not immunize full power stations from antitrust liability. If the FCC sanctions such exclusive settlements, there is every possibility that full power stations will use that opportunity to collude to remove the LPTV operator(s) from the market for competitive purposes only. Courts have long held that merely being an FCC licensee does not immunize a party from antitrust liability. Midessa Television Company v. Midessa Telecasting Co., 617 F.2d 1140, 1145 (5th Cir. 1980); MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1103 (7th Cir. 1983). The FCC should reaffirm this case law in this proceeding, and protect LPTV stations from the inherently anticompetitive environment that intra-market settlements produce. Remember, LPTV stations are secondary to full power stations only from an interference standpoint -- not a competitive standpoint. As businesses, LPTV have not forfeited their rights under the antitrust laws of the United States by becoming LPTV licensees and the FCC cannot take away this fundamental right.

VI. CONCLUSION

CBA submits that the FCC has prematurely concluded that there is nothing it can do to protect any operating LPTV stations from displacement by ATV allocations. As demonstrated herein, there are a number of steps which the FCC can take to minimize the disruption of service to the television public inherent in the changeover to ATV. None are administratively burdensome, and none will ultimately slow the introduction of ATV service, unless full power stations attempt to use the conversion as an opportunity to eliminate a competitor in the market. CBA strongly urges the FCC, therefore, to adopt the suggestions contained herein.

Respectfully submitted,

COMMUNITY BROADCASTERS ASSOCIATION



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